BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA J. DETIENNE	)	
Claimant	)	
VS.	)	
	)	Docket No. 220,624
AUTOMOTIVE CONTROLS CORP	)	
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INS CO NY	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appealed the Award dated March 25, 1998, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on November 4, 1998.

APPEARANCES

Patrick C. Smith of Pittsburg, Kansas, appeared for the claimant. Garry W. Lassman of Pittsburg, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, on August 28, 1998, the parties filed a stipulation that claimant's average weekly wage for purposes of this claim is $362.49 when fringe benefits are included.

ISSUES

After finding and averaging a 9 percent task loss with a 100 percent wage loss, Judge Clark found claimant had a 54.5 percent permanent partial general disability. Both parties requested review of the nature and extent of disability findings.

Claimant argues that her task loss is greater than 9 percent, and that the Judge erred by not averaging Dr. Frank Ise's task loss opinion with that of Dr. Mills.

On the other hand, respondent argues that claimant has only a 4.25% task loss, and that a post-injury wage should be imputed because claimant is not making a genuine or good faith effort to find employment. Respondent contends that claimant is not being hired for jobs that are within her permanent medical restrictions because she is telling potential employers she is not certain she can perform the work. Therefore, respondent requests the Appeals Board to impute a minimum wage for purposes of the wage loss prong of the permanent partial general disability formula.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) In September 1993, Linda J. DeTienne started working for Automotive Controls Corp. assembling small parts. In the spring of 1995, Ms. DeTienne began experiencing symptoms in her hands, wrists, and arms.

(2) After seeking medical treatment and eventually being diagnosed as having bilateral carpal tunnel syndrome, Ms. DeTienne underwent right carpal tunnel release surgery in May 1996 and left carpal tunnel release surgery in June 1996.

(3) The parties stipulated that Ms. DeTienne sustained personal injury by accident arising out of and in the course of her employment with Automotive Controls from June 2, 1995, through her last day of work for that company on January 17, 1997.

(4) Phillip R. Mills, M.D.,who is board certified in physical medicine and rehabilitation, examined Ms. DeTienne in December 1996. He diagnosed post bilateral median nerve releases and arthritis in the left thumb. He believes Ms. DeTienne has sustained a 14 percent whole body functional impairment as a result of her injuries and that she should observe the following permanent medical restrictions:

> She should do no resisted gripping or crimping, avoid repetitious or prolonged wrist flexion/extension, vibratory tools, direct wrist pressure, or work environments less than 50 degrees without adequate clothing. These are the standard carpal tunnel syndrome restrictions. In addition, on the left side she is going to have to avoid activities which cause her to push with her thumb and have repetitious and resisted pinch with the thumb.

(5) Reviewing a list prepared by Mr. Jerry Hardin of job tasks that Ms. DeTienne had performed in the 15-year period before her hand and wrist injuries, Dr. Mills identified 4 of 50 tasks that she should no longer perform.

(6) Semi-retired orthopedic surgeon Frank Ise, M.D., examined Ms. DeTienne in June 1997 at her attorney's request. His diagnosis was similar to that of Dr. Mills. And he also found arthritis in the right thumb. He believes Ms. DeTienne has a 17 percent whole body functional impairment and that she should not lift over 20 pounds or repetitively use either upper extremity.

(7) Reviewing the tasks list prepared by Mr. Hardin, Dr. Ise adopted Mr. Hardin's analysis as expressed in that document that Ms. DeTienne had lost the ability to perform 28 percent of her former job tasks. But when the doctor was questioned about specific job tasks, he admitted he did not understand the physical requirements of the individual tasks listed and had no idea why Mr. Hardin believed Ms. DeTienne was unable to perform some.

(8) The Appeals Board agrees with Judge Clark that Dr. Mills's opinions regarding task loss is more credible than that of Dr. Ise. Therefore, the Appeals Board finds that Ms. DeTienne's task loss is 4 percent. That percentage is derived from Dr. Mills's testimony and eliminating 3 duplicative tasks that Ms. DeTienne performed at Automotive Controls. Therefore, rather than being unable to perform 4 of 50 of her former tasks, Ms. DeTienne is unable to perform 2 of 47.

(9) After recuperating from her surgeries, Ms. DeTienne returned to work at Automotive Controls in December 1996. The company placed her on medical leave of absence in January 1997 after determining that it had no work that she could perform within her permanent work restrictions. Ms. DeTienne has made a good faith effort to find appropriate employment. The contentions that her efforts are less than genuine are not supported by the record. Unfortunately, at the time of the regular hearing held in November 1994, she remained unemployed.

(10) The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

(1) Because hers is an "unscheduled" injury, the formula for permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the 15-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the

> percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute, however, must be read in light of Foulk[1] and Copeland[2]. In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(2) As indicated in the findings above, Ms. DeTienne has made a good faith effort to find appropriate employment. Therefore, the actual pre- and post-injury wage difference should be used in the permanent partial general disability formula. And that difference is 100 percent.

(3) Averaging the 4 percent task loss and the 100 percent wage difference yields a 52 percent permanent partial general disability.

(4) The parties stipulated that Ms. DeTienne's average weekly wage is $362.49 when fringe benefits are included in the computation. Therefore, the Appeals Board finds the average weekly wage is $362.49 after January 17, 1997, when she was terminated and presumably lost her additional compensation items. The Appeals Board affirms the Judge's finding of a $320 average weekly wage for the period before January 17, 1997.

AWARD

WHEREFORE, the Appeals Board modifies the Award to both increase the average weekly wage to $362.49 to conform with the parties' stipulation and decrease the permanent partial general disability to 52 percent.

Linda J. DeTienne is granted compensation from Automotive Controls, Corp., and National Union Fire Ins. Co. NY, for a January 17, 1997, accident and a 52% permanent partial general disability. Based upon a $320 average weekly wage, Ms. DeTienne is entitled 28 weeks temporary total disability benefits at $213.34 per week, or $5,973.52.

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Based upon a $362.49 average weekly wage, Ms. DeTienne is entitled 209.04 weeks of permanent partial general disability benefits at $241.67 per week, or $50,518.70, making a total award of $56,492.22.

As of November 30, 1998, there is due and owing Ms. DeTienne 28 weeks of temporary total disability compensation in the sum of $5,973.52, and 69.43 weeks of permanent partial general disability compensation in the sum of $16,779.15, totalling $22,752.67, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $33,739.55 is ordered paid for 139.61 weeks at the rate of $241.67 per week, until fully paid or further order of the Director.

The Appeals Board adopts the remaining orders as set forth in the Award to the extent that they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS
Garry W. Lassman, Pittsburg, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director